No. 8352

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MRS. AH FOOK CHANG, alias Kam Yuen and ROBERT CHANG, alias Yuk Moon,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Territory of Hawaii.

BRIEF FOR APPELLEE.

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I.

STATEMENT OF THE CASE.

Mrs. Chun Doon, a resident of Hilo, wrote to one Dang Wing Kong, of Wailluku, Maui, requesting twenty-four (24) tins of opium be brought to Hilo (R. p. 16). Thereafter, Dang Wing Kong communicated with Mrs. Ah Fook Chang, asking her if her son Robert wished to make the trip (R. p. 15), which Robert thereafter agreed to do. The Defendant, Robert Chang, then came to Honolulu and obtained the twenty-four tins of opium from one Hong Yin Pin and left Honolulu on that same day on a steamer for

Hilo, arriving at Hilo on December 18th (R. p. 15). He was accompanied to Hilo by his mother and co-defendant, Mrs. Ah Fook Chang. On arrival Robert Chang obtained a room at the Maunakea Rooming House (R. p. 52).

In the afternoon of December 18th George J. Richardson, Inspector of Police for the County of Hawaii, who has been in the Hilo Police Department for fifteen or sixten years (R. p. 99), detailed Police Officers R. Takamoto and Antone Pacheco, who were accompanied by Investigator Lee A. Pearson, to keep Robert Chang under surveillance (R. p. 120), which they did from about 5 P. M. to 7 P. M., at which time they saw Robert Chang coming out of the Maunakea Rooming House. When they (the Police Officers) approached, revealed their identity, and said to him "We want to look into your room. Can you give us permission to go into your room?", Chang replied "O. K." (R. p. 118) and without any threats or intimidation on the part of the officers Robert Chang led them to his room on the second floor of the Rooming House. Upon arrival at the door he took a key from his pocket, went into the room, turned on the light, and said "Come in"; that thereupon they entered the room (R. p. 119). Robert Chang was then asked what was in a suitcase that was lying on the floor. Chang opened the suitcase and told them to go ahead and see what was in it. In the suitcase they found a package containing twelve (12) tins of opium, and in a similar package on the table they found twelve (12) more tins of smoking opium (R. p. 119).

Thereafter, Police Officer Antone Pacheco and Inspector Richardson went to the vicinity of Mrs. Chun Doon's store. Police Officer Pacheco went into the store, where he found Mrs. Ah Fook Chang talking to Mrs. Chun Doon. He asked her if Robert Chang was her son and upon receiving a reply in the affirmative he asked her to accompany him to the Maunakea Rooming House (R. p. 134). He took her across the street where Mr. Richardson was waiting in his car (R. p. 107) and they then proceeded to Robert Chang's room where the two boxes of opium were shown her. Thereafter, both Defendants were taken by the Police Officers to the Police Station and booked by Inspector Richardson for investigation to the Hilo Police Department (R. p. 99), where they remained booked until 9 or 10 o'clock of the evening of December 19th.

At about the hour of 2 P. M. on December 19th, Federal Narcotic Officer William K. Wells arrived by airplane (R. p. 101) which was late in reaching Hilo, and at about 3 o'clock on the same day the two Defendants were questioned in the office of Inspector Richardson. During the entire questioning there were no threats or bull-dozing (R. p. 111). The questioning was conducted in an ordinary tone of voice. The windows were open and the door was open part of the time (R. p. 123). The Defendants were each told that "they didn't have to make any statement if they didn't want to" (R. p. 123). A statement of each of these Defendants was taken on the afternoon of December 19th, but during the dinner hour Police Officer Antone Pacheco had a conversation with Mrs. Ah Fook Chang

in which she informed Mr. Pacheco "that a fellow from Honolulu wrote to her for her to send her son down to get this opium, and then the son would meet her at Maui, going to Hilo" (R. p. 109). This statement did not agree with the statement she had given to the Officers in the afternoon, and Officer Pacheco conveyed this information to Narcotic Agent Wells (R. p. 109) and that after dinner, and in the evening of December 19th, other statements, which are the statements introduced in evidence, were taken by the Police and Federal Officers, the questioning being principally done by Inspector George G. Richardson and William K. Wells of the Narcotic force (R. pp. 100, 122).

The Defendant, Mrs. Ah Fook Chang, was very anxious to help her boy out of trouble and tried to get the Officers to promise not to put him in jail. This, of course, they could not and would not do (R. p. 112).

During the entire confinement of the Defendants up to the time the confessions were signed, they were in the custody of, and booked by, the Territorial police officers of the Island of Hawaii (R. p. 99). They were not mistreated or threatened in any way. On the morning of the 20th of December a Commissioner's complaint was issued by the United States Commissioner in Hilo and they were charged with violations of the Federal narcotic laws (R. p. 112).

The Defendant, Robert Chang, stated, in substance, that the reason he signed the confession and permitted the Officers to search the room was that he was afraid they were going to lick him (R. pp. 97, 56). The De-

fendant, Mrs. Ah Fook Chang, stated the reason that she signed the confession was, in substance, that they would not let her telephone to anyone, let her sleep (R. p. 88), or give her sufficient food (R. pp. 82, 83), that four or five officials were questioning her continually, and because of having an infant child with her (R. p. 88), wanted to get away and get out of custody. On the other hand, it appears from the Officers that Robert Chang was not threatened in any manner, shape or form. When permission was sought to search his room the man was not threatened in any way and he readily consented to the search (R. pp. 67, 63), and upon cross-examination of Robert Chang at the hearings before the Court he was very reticent to answer questions and evaded the issue as much as possible (R. p. 54), while on the other hand, when questioned by his own counsel, very glibly stated that "numerous and sundry threats were made", but when being pinned down to what actualy happened along that line he had nothing definite to say; that when Robert was questioned at the Police Station he was questioned by the Officers in an ordinary tone of voice, was not badgered or threatened in any way (R. pp. 106, 100, 101, 110, 111).

With reference to the Defendant, Mrs. Ah Fook Chang, she was taken to the Police Station with her child—she being a resident of the Island of Maui (R. p. 81) and not of the Island of Hawaii, there was nothing else to do with her child but let it remain with her—that during the time she was confined there by the Hilo Police Department she was given the same

prison fare as anyone else and, in addition to having available to her the regular prison fare, was permitted to purchase anything she wanted for herself and baby, and did on at least one occasion ask a Police Officer to go out and get certain food for her, which he did (R. p. 105). That during the whole period of her confinement she was not badgered or mistreated in any way, shape or form. That she was principally interested in her boy's welfare and that the statements signed by herself and her son were made in the absence of any threats or promises of immunity or hope of reward (R. p. 112).

After the indictment a motion to suppress the evidence seized in the Maunakea Rooming House was filed, heard and denied. Thereafter, a motion to suppress the confessions was filed and after a hearing they were denied. Upon the trial the chief witnesses were called in behalf of the Government and upon the Government closing its case counsel for the Defendants attempted to have the testimony of the two Defendants taken upon the hearings for the suppression of the confessions read to the jury and considered by it (R. p. 158), which was denied, and the defense rested without putting on any evidence.

ARGUMENT.

I.

ILLEGAL SEARCH AND SEIZURE.

(A) Search made without a search warrant.

(B) Evidence obtained by state officers may be used by Federal Government.

(C) Voluntary consent was given to make the search.

(D) The question of voluntary consent ruled on with ample evidence to suport finding will not be disturbed.

(E) Offer of proof regarding demand for search properly denied.

(F) A search warrant could not be easily obtained.

(A) It is and has been admitted throughout the entire proceeding that the officers had no Search Warrant.

(B) It is not conceded that the search in this case was a Federal search as Police Officers were detailed by their superior to keep the Defendants *under surveillance* (R. p. 127); that it has been the practice in Hilo in narcotic or liquor cases for the Territorial courts to prosecute the smaller cases, while the larger ones were turned over to the Federal authorities, and that each had turned over cases to the other, but "that in this particular case the investigation was being made by him *as a Hilo police officer* assisted by Mr. Pearson, a Federal officer" (R. p. 131). (Mr. Pearson is an investigator with the Alcohol Tax Unit in Hilo, Hawaii). After the seizure, the Federal Narcotic Division was notified and Mr. Wells, a Narcotic Agent, arrived the next day (R. p. 131). The Defendants were booked for investigation to the Hilo Police Department (R. p. 99) and were turned over

to the Federal authorities on December 20th (R. p. 132).

Byars v. U. S., 273 U. S. 28, is a counterfeiting case and there were no laws in Iowa in that regard, while in the present case Chapter 42 of the *Revised Laws of Hawaii 1935* provides:

> "It shall be unlawful for any person to produce, manufacture, possess, have under his control, sell * * * any habit forming drug" (cocoa leaves and opium) "except as provided".
>
> Sec. 1272, *Revised Laws of Hawaii 1935,*

making the usual exceptions of physicians, dentists, etc., and in Hawaii a

> "policeman, or other officers of justice, in any seaport or town, even in cases where it is not certain that an offense has been committed, *may,* without warrant, arrest and detain for *examination* such persons as may be found under such circumstances as justify a reasonable suspicion that they have committed or intend to commit an offense."
>
> Sec. 5403, *Revised Laws of Hawaii 1935.*

This was done in this case and

> "the mere participation in a state search by one who is a federal officer does not render it a federal undertaking."
>
> *Byars v. U. S.,* 273 U. S. 28(a) 32,

even though the courts should be vigilant in such cases to see that the Constitution is not violated by circuitous methods. In this case it was purely a Ter-

ritorial matter, at least until after the search was consummated.

No matter whether the search was a legal one or not, it being a Territorial matter and the violation being both a Territorial and Federal offense, the evidence is admissible in a Federal court, for a recent case in which certiorari was denied the court said:

> "If it be assumed that the search and seizure were illegal, the evidence was nevertheless properly received, since evidence wrongly secured by state officers is admissible in prosecutions for federal crimes."
>
> *Burkis v. U. S.,* 60 F. (2d) 542 (Cert. denied, 287 U. S. 655), 77 L. Ed. 566.

See, also:

Weeks v. U. S., 232 U. S. 383, 58 L. Ed. 652;
Wharton's Crim. Ev., 11th Ed., Vol. 1, p. 375;
Rice v. U. S., 251 Fed. 778 (1 C. C. A.);
Kanellos v. U. S., 282 Fed. 462 (4 C. C. A.).

During the days of prohibition the trend of decisions was to hold inadmissible evidence obtained by an unlawful search in which Federal agents participated, but at present the criterion is whether or not the state officers were enforcing state laws, and in the case at bar there is a Territorial violation which distinguishes it from *Byars v. U. S.,* supra, and *Gambino v. U. S.,* 275 U. S. 310, 72 L. Ed. 293.

(C) The search in this case, even though it should be construed to be a Federal search, is a legal and valid one. Robert Chang is twenty-four years old, had a fifth grade education and had the experience of

travel to China (R. p. 51) and was smart enough to be selected by an opium peddler to go to Honolulu from Maui to get twenty-four (24) five-tael tins of opium and to take the same to Hilo, deliver it, and collect $3000, and take it back to Maui with him (R. pp. 142-143). He also was smart enough so that he would not deliver the purchase money to Hong Yin Pin until the opium was delivered (R. p. 141). He arrived in Hilo on the morning of the 18th but had not delivered the opium at 7:00 P. M. to Mrs. Chun Doon, the prospective purchaser.

When questioned by counsel in support of the Motion to Suppress Evidence with reference to going to and opening his room which was searched, he readily replied in effect that he was afraid he would be licked and that the officers shoved him and demanded that he open his door and the suitcase (R. pp. 52-54), while on cross-examination he stated he did not know there was any opium in his room (R. p. 56) and that he had no fear of them finding opium there but that all he was afraid of was that they might lick him (R. pp. 57-58) and that he "didn't remember" whether he had told Mr. Wells that he had given the officers permission to search his room and was evasive in his answers (R. pp. 58-59) and then, on redirect examination, he changed his story, when led by counsel, that he knew there was opium in his room (R. p. 60). The three officers who were present all stated that there were no threats made and permission was voluntarily given and that Robert led the way and after unlocking the door invited them in (R. p. 62), and told them to "go ahead and look around" (R. p. 66).

It is conceded that a defendant may waive his constitutional rights under the Fourth Amendment but it is contended that the waiver claimed here was not voluntary, and cites in support thereof several cases holding that consent was not voluntary. We will review them briefly to show their inapplicability.

In the case of *Herter v. U. S.* (C. C. A.—9), 27 F. (2d) 521, a federal officer went to defendant's home and accused him of running a still and said that he had come after it. Defendant denied having a still. Then the officer replied "If you have not, you do not mind my looking for it" and said that the defendant then invited him in. This was denied throughout by defendant and his wife, who stated that consent was refused. In the case at bar the officers' statements as to consent are corroborated by the written testimony of defendant (R. pp. 13, 14) and the absence of any denial that he, Robert Chang, had given them permission.

In the case of *U. S. v. Baldocci* (D. C. (A1)), 42 F. (2d) 567, a narcotic officer after arresting the defendant told the defendant that he knew where he lived, drove the defendant there, and then said to defendant "will you allow me to enter, or will I go and obtain a search warrant". To which defendant replied, "All right, you may enter".

In the case of *U. S. v. Kelih* (D. C.), 272 Fed. 484, the officers went to the premises armed with a faulty search warrant which they believed to be valid and the defendant attempted to stop them.

In the case of *U. S. v. Rembert* (D. C.), 284 Fed. 996, the officers stopped defendant's car on a highway about midnight because it was zigzagging along, searched it, and found liquor. No request for a search or consent was asked or given.

In the case of *U. S. v. Shuser* (D. C.), 270 Fed. 818, officers went to the premises without a search warrant and said "they were there to search for liquor", to which the defendant replied "All right. Go ahead".

In the case of *Territory v. Ho Me.,* 26 Haw. 330, the defendant had left his room, closed and locked the door. He was arrested, searched, and a key taken from him which the officers used to open the door to his premises, and then proceeded to search. No consent to search was asked or obtained.

In the case of *U. S. v. Kozan* (D. C.), 37 F. (2d) 415, an officer searched the liquor stockroom of a drug store. No consent was asked or given.

In the case of *U. S. v. Marra* (D. C.), 40 F. (2d) 271, prohibition officers went to defendant's door and told defendant who they were and that they "were going to inspect the premises". Defendant replied "All right".

In the case of *Brown v. U. S.* (C. C. A.—5), 83 F. (2d) 383, the officers went in by virtue of an invalid search warrant and no consent was asked or given.

In the case of *U. S. v. Lee* (C. C. A.—2), 83 F. (2d) 195, there was a search made without a warrant, without consent, and not as an incident of a lawful arrest.

In the case of *Amos v. U. S.*, 255 U. S. 313, the officers went to defendant's home and said they "had come to search the premises" for violations of the Revenue law. The defendant then opened the door and they entered and searched. No consent was asked or obtained.

In the case of *Farris v. U. S.* (C. C. A.—9), 27 F. (2d) 521, officers entered without permission and then said they had to "look over or search the house". Defendant replied "All right. You will find nothing here now".

None of the cases cited by appellant with reference to consent come within the facts in the case at bar. They deal with situations which show an implied coercive demand, amounting to creating the impression that they are going to search, irrespective of consent. The consent under such circumstances amounted merely to a lock of resistance on the part of defendant. Where there has been a request made by officers to make a search without any threats or coercion under facts similar to this case and consent has been given, evidence so found has always been held to be admissible.

In the case of *Dillon v. U. S.* (C. C. A.—2), 279 Fed. 639, at 646, officers went into a hotel bar, saw two men drinking, seized the liquor. They asked defendant's permission to search the premises and to accompany them on the search. Defendant replied "Certainly; I will show you through everywheres". He got his keys, took them through the hotel. Liquor was found in the icehouse. The court said:

> "We are unable to see that the search violated his constitutional rights."

In the case of *U. S. v. Smith* (D. C.), 46 F. (2d) 82, the officers walked up to defendant, asked him if he occupied the premises, said they were police officers and had a complaint of a fire hazard in the form of a still. Defendant denied having a "still in the house. You can go right in and look through the place if you want to". Liquor was found but no still. The evidence was held admissible.

In the case of *Hilt v. U. S.* (C. C. A.—5), 12 F. (2d) 504, the captain of the vessel searched admitted there was liquor aboard and gave the officers permission to search. The vessel was pursued and overtaken by the officers in a revenue cutter. The court said:

> "A warrant is unnecessary where the search made made after admission of a fact under circumstances that tend to show the law is being violated, and by *consent of the party entitled to object.*"

In the case of *Waxman* (C. C. A.—9), 12 F. (2d) 775, officers went to defendant's house, told him they could smell "a strong odor of mash coming from the house" and that there must be a still on the place. This defendant denied, and said "You can go and look" or "Go ahead and find it, then". A still was found. The court held:

> "We do not deem it necessary, however, to consider the question of the right of search, because the court below was fully justified in finding that

> the 'defendant' consented thereto, and, having consented, is in no position to claim that his constitutional rights were invaded."

Certiorari was denied. 273 U. S. 716.

In the case of *Huhman v. U. S.* (C. C. A.—8), 42 F. (2d) 733, the officers had a warrant for the dwelling but none for the still house a half mile away. The officers informed the defendant that they knew of its existence and, learning this, defendant said "All right, if you know where it is" and *led the way to the still house.* The court said in this connection "by so doing he waived his right to assert or claim that the searches and seizures made were unreasonable".

See, also:

Giacolone v. U. S. (C. C. A.—9), 13 F. (2d) 110;

Cantrell v. U. S. (C. C. A.—5), 15 F. (2d) 953;

Gatterdam v. U. S. (C. C. A.—6), 5 F. (2d) 673;

Hodges v. U. S. (C. C. A.—10), 35 F. (2d) 594.

(D) The question of an illegal search and seizure in this case was raised before trial and evidence was adduced on both sides and the Court in hearing the Motion stated that the question to be decided was whether the consent to search was voluntarily given or obtained by coercion (R. p. 69), and by overruling the Motion (R. p. 72) found as a fact that the consent was voluntary and without coercion.

In the case of *Schutte v. U. S.* (C. C. A.—6), 21 F. (2d) 830, the court said:

> "In the search of a dwelling made by consent, no search warrant is necessary. * * * As to whether such consent was freely given, there was a question of fact. The court found as a fact that consent was given and without duress; this conclusion was amply supported by the evidence; no question of law thereon remains for review."

In the case of *Baldwin v. U. S.* (C. C. A.—6), 5 F. (2d) 133, the court stated:

> "According to some authorities his (court's) finding upon a perliminary quest of admissibility is conclusive and will not be reviewed; but in any event, his finding carries the same weight as the finding of a jury upon a disputed issue of fact and will not be disturbed by a reviewing court unless error is manifest."

On the question of admissibility of evidence where the question of its admissibility became one of fact the Supreme Court has said:

> "We have no hesitation in saying that the finding of the court below is, at least to have the effect of a verdict of a jury upon a question of fact, and should not be disturbed unless the error is manifest."
>
> *Reynolds v. U. S.,* 98 U. S. 145, at 159; 154 L. Ed. 244.

See also:

Hale v. U. S. (C. C. A.—8), 25 F. (2d) 430, 437;

Bram v. U. S., 168 U. S. 532, 555; 42 L. Ed. 568;

Magnum v. U. S. (C. C. A.—9), 289 Fed. 213, 215;

Rossi v. U. S. (C. C. A.—9), 278 Fed. 349, 353.

(D) Denial of Request to have former testimony considered. The request to have the testimony of defendants upon the Motions to Suppress was properly denied. The defendants were available and present in court at the time of the request.

> "Testimony taken at trial cannot be read at a subsequent trial if the witness is obtainable." *Wharton, Crim. Evid.,* 11th Ed. p. 1126.

(E) The offer of proof complained of by appellants, which was denied, was an attempt on the part of counsel during the hearing on the Motion to Suppress evidence to go on a fishing expedition. The question then before the court was whether the search made of the Defendant, Robert Chang's, room at about 7:00 P. M. December 18, 1935, was made with Defendant's voluntary consent. In substance, his offer was to prove by cross-examination of Government witnesses, without making or offering to make them his own, that the Police Officers shadowed Defendants in Hilo from 5 P. M. to 7 P. M. and when they thought the auspicious moment had arrived, approached Robert Chang, demanded permission to search his room (R. p. 65) and intimidated or forced him against his will to open his door (R. p. 69). Counsel admits that what happened from 7 P. M. on

had been related in the evidence (R. p. 70). Robert Chang testified that he first saw them at about 7 P. M. of that day (R. p. 52), so there could have been no prior coercion or intimidation.

(F) Inspector of Police Richardson, who was in charge of the investigation, stated that on the morning of December 18th he received information that the Defendants had opium, but his information was not positive as to where it was (R. p. 127). The witness Pearson testified that he did not have any facts upon which he could obtain a search warrant (R. p. 124). So it patently appears that any effort to obtain a warrant would have been fruitless.

II.

CONFESSIONS OF MRS. AH FOOK CHANG AND ROBERT CHANG.

(A) Confessions made while in custody.

(B) Refusal of defendants' proposed instructions with reference to confessions.

(C) A confession is presumed to be voluntary.

(A) The Defendants in this case were in custody of the Territory when their confession were obtained, having been booked for investigation by Inspector Richardson on December 18, 1935, at 7:26 P. M. (R. p. 107) and so remained until about 10 P. M. December 19, 1935 (R. p. 99). They were not mistreated in any way during their incarceration. There were no threats or promises and they were told that they

did not have to make any statement if they did not want to (R. pp. 110, 111, 123).

> "The mere fact that a confession is made while the maker is in the custody of a police officer, or even while confined under arrest, is not sufficient of itself to effect its admissibility, providing that it is otherwise voluntarily made. This rule pertains equally whether the arrest is legal or illegal."
>
> *Wharton's Crim. Evid.*, 11th Ed., p. 1023.

> "The fact that he (defendant) is in custody and manacled does not necessarily render his statement (confession) involuntary, nor is that necessarily the effect of popular excitement shortly preceding."
>
> *Wilson v. U. S.*, 162 U. S. 613, at 623; 40 L. Ed. 1090.

(B) Refusal of Defendants' proposed instructions with reference to confessions. In this case, as in the case of *Lewis v. U. S.* (C. C. A.—9), 74 F. (2d) 175, the only evidence adduced on the part of the Defendant as to the confession being involuntary was in the absence of the jury. Plaintiff upon the evidence in the case in chief again showed that the confessions were free and voluntary (R. pp. 123, 126-127, 132, 134, 136-137). At the conclusion of Plaintiff's case Defendants' counsel endeavored to have the sworn testimony of Defendants read into evidence. This was objected to as it did not give the Plaintiff an opportunity to cross-examine the Defendants on the case in chief (R. p. 159) to which it would have been entitled. The

objection was sustained. Defendant was accorded the right to produce evidence by the Defendants but elected not to put them on the stand (R. pp. 161, 162).

> "It thus appears that the evidence before the court bearing upon the admissibility of the confession and the evidence before the jury upon the same subject were different, and that the ruling of the court admitting the confession was based upon one state of the evidence and the verdict of the jury upon another. This distinction is important in considering the assignments of error as to instructions given to the jury and the refusal of appellant's proposed instructions." (Page 175). "* * * The defendant proposed fourteen instructions to the jury, bearing upon the question of the rejection of the evidence of confessions in the event the jury determined that the confessions were involuntary. It is a sufficient answer to the exceptions to their refusal to repeat that there is not sufficient conflict in the evidence, as presented to the jury concerning whether or not the confession was voluntary, to justify submission of that question to the jury." (Page 179.)
>
> *Lewis v. U. S.*, supra.

> "That law and practice are that the trial court should, in the absence of the jury, first hear the evidence upon the prima facie case, when the legality and voluntariness of the confession are brought in question, as they usually are, unless defendant pleads guilty. When the court is satisfied that the government has made a prima facie case, making for admissibility, that is, when the evidence discloses that the confession was made without duress, or violence, promises, or threats,

but voluntarily, the jury is called in, and the evidence as to the facts and circumstances of the procurement of the confession is heard by the jury. Evidence contra is, in the course of the trial, offered by the defendant, and the confession, having been admitted on the court's personal finding of prima facie admissibility, is read or detailed to the jury by the witnesses; leaving to the jury, by an appropriate charge, the question as to whether it was in fact unlawfully obtained, for that duress, force, threats, or promises were employed, had, or made in its obtention."

Ramsey v. United States, 33 F. (2d) 699, at 700 (C. C. A.—8).

(C) A confession is presumed to be voluntary.

"Both counsel * * * labored under the erroneous impession that it" (a confession) "was presumptively inadmissible, and that the government carried a heavy burden in establishing the voluntary character of such a statement, which burden was not met, if there was any evidence tending to impeach the statement of those who secured the statement. We do not so understand the law. * * * Admissions are, when freely made, competent evidence. * * * We must give this statement * * * the presumption to which it is entitled, the *presumption* that it was voluntarily made."

Murphy v. U. S. (C. C. A.—7), 285 Fed. 801, at 807 and 808. Cert, denied, 261 U. S. 617.

"The question to be determined by this court with reference to the admissibility of the confession is whether or not the court abused its discretion in admitting the evidence. Mangum v.

U. S. (C. C. A.) 289 F. 213, 215; Hale v. U. S. (C. C. A.) 25 F. (2d) 430, 437. In Mangum v. U. S., supra, this court, speaking through District Judge Bean, stated the rule thus: 'But where on the trial of a criminal case a confession of the defendant is offered in evidence it becomes necessary for the trial court to ascertain and determine as a preliminary question of fact, whether it was freely and voluntarily made, and whether the previous undue influence, if any, had ceased to operate upon the mind of the defendant. In doing so, the court is necessarily vested with a very large discretion, which will not be disturbed on appeal, unless a clear abuse thereof is shown. State v. Rogoway, 45 Or. 601, 78 P. 987, 81 P. 234, 2 Ann. Cas. 431; State v. Squires, 48 N. H. 364''.

Lewis v. U. S., supra.

III.

DEMAND FOR PRODUCTION OF CONFESSION.

During the hearing on the Motion to Suppress the confession of the Defendant, Mrs. Ah Fook Chang (the confession of Robert Chang was not requested to be suppressed, although its admission was objected to (R. p. 139)), a request was made for the production of her confession. The only thing at issue was whether or not it was voluntary. This has nothing to do with its contents. Counsel at the time gave no authority for his request nor has he in his brief on appeal. The answer is obvious. There is none.

"However, in criminal cases, it is very evident that the accused cannot compel the prosecution to produce documents which he himself has made. Thus he is *not entitled* to have incriminating letters, written by him, produced for his inspection; nor to have produced *a statement made and signed by him* even on the ground that such statement is material to his defense."

Wharton's Crim. Evid., 11th Ed., Vol. II, p. 1354.

A collection of cases on this point may be found, if needed, in the notes to the last citation.

IV.

INSTRUCTION ON VOLUNTARINESS OF CONFESSION GIVEN.

An instruction was given with regard to whether or not the confession was voluntary (R. pp. 171-173) and the jury in convicting the Defendants found that they were voluntary.

V.

CONFESSION ONLY EVIDENCE AGAINST PARTY MAKING IT.

In counsel's Opening Brief he has charged that the officers "glibly testify", "reel off the formula with the monotony of a court clerk", that their getting permission to search as "colorless and flaccid" and that their testimony as to the lack of threats or force "is senseless". An Honorable Judge decided otherwise.

It is quite possible that the above assertions bear as much truth as the following assertion in appellants' brief:

> "In this case the record does not disclose that Robert Chang even knew that Mrs. Ah Fook Chang had made a confession, or if so, what it contained." (Appellants' Brief, p. 44.)

The Court asked the witness Wells, referring to the confession of Mrs. Ah Fook Chang:

> "Q. At the time this statement was read to Mrs. Ah Fook Chang was Robert Chang present?
>
> A. Yes sir.
>
> Q. He heard the statement read to her?
>
> A. He was sitting in the room on my right; Mrs. Ah Fook Chang was on the left of the table.
>
> The Court. It appearing that this statement was made in the presence of the defendant Robert Chang, the instruction will not be given."

> "The general rule regarding the inadmissibility of the confessions and admissions of guilt of co-conspirators and codefendants is usually stated by the courts with the proviso that such statements are inadmissible when made in the absence of the defendant. This is for the reason that a confession or admission of a co-conspirator or co-defendant may be admissible if made in the presence of the accused and assented to by him, either expressly, impliedly, or tacitly by silence or conduct. In such case then, the confession or admission of the co-conspirator or codefendant loses its inherent nature and becomes evidence which is merely incidental and coupled to the statement or conduct of the defendant in affirming and assent-

> ing to the truth of the statement made. It is really, then, not the confession or admission of a co-conspirator or codefendant which is admissible against the defendant in this situation, but his statement, action, or reaction thereto, and primarily a confession or admission of the defendant is had by assent or adoption. * * *"
>
> *Wharton's Criminal Evidence,* 11th Ed., Vol. 2, p. 1216.

In this case, *Bachelor v. State,* 216 Ala. 356, 113 So. 67, at 70, where a confession of one was sought to be used against another, the court said:

> "It was necessary for the State to show that it was made in the presence of the defendant and he remained silent or that he affirmed the truth of the statement."

See also:

People v. Carmichael, 314 Ill. 460, 145 N. E. 673;

Sutton v. Commonwealth, 207 Ky. 597, 269 S. W. 754.

In the case at bar the evidence shows that the Defendant, Mrs. Ah Fook Chang, urged her son, Robert, to tell the truth (R. pp. 101, 145); that she was present when the confession was made (R. p. 145) and upon it being signed by Robert Chang Mrs. Ah Fook Chang was asked whether or not it was true and she replied that it was true. Thereafter, Mrs. Ah Fook Chang's confession was taken. It is in absolute conformity with her son's. He was present when it was read to her. There is not one substantial thing in this con-

fession which is not Robert's confession, which she assented to. So that if any error has been committed it is harmless.

VI.

COURT'S INSTRUCTION TO JURY FOREMAN.

The Foreman of the Jury came to the Judge's Chambers where counsel for both parties were present, and asked if the confessions could be considered against both Defendants. The Judge again adhered to his former ruling. In the cases cited by Defendants the facts were far different than in the instant case. In the case of *Fillipon v. Albion Vein Slate Company* in reply to an inquiry of the jury during its deliberations sent an instruction to them covering the inquiry. Neither counsel nor parties were present. The court said:

> "We entertain no doubt that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict."
>
> *Fillipon v. Albion Vein Slate Company,* 250 U. S. 76, at 81.

In the case of *Little v. U. S.,* 73 F. (2d) 861 (C. C. A.—10), a stenographer was sent to the jury room to read the instructions theretofore given by the court. The defendant or his counsel were not present.

In the case of *Mattox v. U. S.,* 146 U. S. 140, at 150, 36 L. Ed. 917, the jury during its deliberations read a newspaper article about the case, which set out that the defendant had been tried for his life once before; that the evidence was very strong against him, and that his friends had given up hope of the jury doing anything but convicting. Mr. Chief Justice Taney said:

> "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are asolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear."
>
> *Mattox v. U. S.,* supra.

In the case at bar all that was done was by the Court in the presence of counsel and only reiterated what had already been given in an instruction. Certainly this is harmless and comes within the exception. The record shows an exception to the Court's adhering to its original ruling with reference to the confession, but no exception to any irregularity of the incident in chambers was taken or was it raised in the Motion for a New Trial.

> "Subject to a few exceptions, the rule is of almost universal application, in many jurisdictions by virtue of express statutory provision, that questions, of whatever nature, not raised and properly preserved for review in the trial court, will not be noticed on appeal; * * *"
>
> *Corpus Juris Secundum,* Vol. 4, page 430.

"It is well settled by a long line of decisions that before error can be sustained to any part of the charge given it must be excepted to and the attention of the judge called to the precise point as to which it is supposed he has erred. The sound reason for this is to enable the judge to reconsider the part of the charge objected to and correct it, if in his judgment it would be proper to do so. Beaver v. Taylor, 93 U. S. 46-54, 23 L. Ed. 797; Pennsylvania R. R. Co. v. Minds, 250 U. S. 368-375, 39 S. Ct. 531, 63 L. Ed. 1039."

Taylor v. United States, 71 F. (2d) 76, at 78.

CONCLUSION.

It is apparent from the record in this case that the Defendants, through their counsel, after hearing the evidence adduced on behalf of the Government on the Motions to Suppress the evidence seized in the room of Robert Chang and to suppress the confession of Mrs. Ah Fook Chang, were satisfied that the evidence was legally seized and the confessions were voluntary in law. Had it been otherwise they certainly would have followed the usual procedure, especially as to the confessions, and put in evidence on their own behalf during the trial tending to show that they were not voluntary, for the benefit of the jury. This they did not do and, of course, it patently appeared by the Plaintiff's evidence that the confessions were in law and in fact voluntary.

There was ample evidence to sustain the Court's ruling that the search was a permissive search.

With reference to the admission of the confession of Mrs. Ah Fook Chang against Robert Chang, it was shown that this confession was read to the mother in the presence of her son; that it did not contain any substantial difference from the facts confessed to in the statement of Robert Chang. So, if there be any error in that regard, it certainly was harmless.

With reference to the confession of Robert Chang—which was considerably more extensive than that of his mother—that confession was admissible as against both Defendants for the reason that after it was read and explained to the Defendant, Robert Chang, in the presence of his mother, she stated to the officers that it was true. The conduct of the Judge in reiterating to the Foreman—not in the presence of the balance of the jury and in the Judge's chambers—that the confessions were admissible as to both Defendants was made in the presence of respective counsel. Had counsel objected to the manner in which this Instruction was given, he certainly would have covered it by his own affidavit for diminution of the record, or, at least when the jury returned a verdict in open court. This he did not do and no objection or exception was made or saved.

Therefore, it is respectfully contended that there is no sufficient ground or reason for overturning the verdict of the trial court.

Dated, Honolulu, T. H.,
February 17, 1937.

Respectfully submitted,

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Receipt of a copy of the foregoing Brief for Appellee is hereby acknowledged this 5th day of February, 1937.

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